IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGEMENT NO. 539 OF 2004

IN

SUMMARY SUIT NO. 128 OF 2004

Vinayak Narayan Upasani .. Plaintiff

versus

Dinesh Bhansali .. Defendant

...

Mr.S.B. Shetye i/b Gaidhani for the plaintiff.

Mr.Tushar Goradia for the defendant.

CORAM : D.G. KARNIK,J.

DATED : 29th March 2005.

P.C.:

1. Heard the learned counsel for the parties.

2. The learned counsel for the defendant admits that Summons for Judgement was served on the defendant. However, no application for leave to defend has been made nor any affidavit in reply has

been filed by the defendant till date. However since the learned advocate for the defendant is present, I would consider the oral submissions made by the learned counsel for the defendant as a demurer.

3. The plaintiff had kept NRE fixed deposit of Rs.22 lakhs in Bank of Baroda. At the request of the defendant, the plaintiff allowed a lien to be created on the said Fixed deposit for money borrowed by the defendant. A written agreement was executed between the parties on 12th November 1999. Under the said written agreement, the defendant agreed that he would repay the loan of the Bank on the due date, and in the unlikely event of his not clearing the bank debt, the amount would be adjusted through L/c negotiations. The defendant did not make the payment due to the Bank. The Bank therefore exercised its right of lien and adjusted a sum of Rs.17,80,496/- payable by the defendant against the said fixed deposits and paid only the balance amount to the plaintiff. The plaintiff has therefore filed this suit for recovery of Rs.17,80,496/- together with interest.

4. Learned counsel for the defendant submits that

there was no agreement to pay interest, in the event the amount was recovered by the Bank from the amount of the fixed deposit. In view of this contention, the learned counsel for the plaintiff gives up the claim of interest prior to the date of the filing of the suit. Statement is recorded and accepted.

5. Learned counsel for the defendant further submits that Summons for Judgement is not in appropriate form i.e. Form no.11 of the Bombay High Court (Original Side) Rules. Form no.11 is only directory and there has been a substantial compliance. Receipt of the Summons for Judgement along with copy of the plaint is not disputed. In the circumstances this defence also has no merit.

6. Lastly, learned counsel for the defendant submits that agreement dated 12th November 1999 was for adjustment through L/C negotiations and not for payment of money. There is an implied agreement to make the payment in case bank recovers the money by encashing the fixed deposit. The defendant has admittedly not paid back the said sum through the L/C negotiations. The fact that the defendant agreed to pay the plaintiff through L/C negotiations itself

shows that there was an implied promise to pay the amount to the plaintiff in case he did not make the payment by L/C negotiations.

7. Thus, none of the submissions made by the learned counsel for the defendant raises any triable issue. In the absence of an application for leave to defend the plaintiff is entitled to a decree under Order 37 Rule 3(6) of the Code of Civil Procedure.

6. In the circumstances, Summons for Judgement is made partly absolute and the suit of the plaintiff is decreed as follows:-

"The defendant shall pay to the plaintiff a sum of Rs.17,80,496/- together with interest thereon at 12% p.a. from the date of the suit till payment and all costs of the suit."

D.G. KARNIK, J